



April 10, 2000

Ms. Elaine S. Hengen
Assistant City Attorney
City of El Paso
2 Civic Center Plaza
El Paso, Texas 79901-1196

OR2000-1409

Dear Ms. Hengen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Texas Government Code. Your request was assigned ID# 133893.

The El Paso Police Department (the “department”) received two requests for information related to a specific offense.¹ You state that the department will release to the victim’s representative a copy of the computer aided dispatch record made regarding the 911 call. However, you claim that the responsive audio tape of the 911 call and the offense reports are excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we address your argument that the department may not search for the requested information because the only information that the requestor provided was the victim’s address. You argue that the address is inadequate information for the city to search its records. You also argue that “[u]sing the address of occurrence as the sole criterion for searching the records would acknowledge and identify the victim” whom you believe has a privacy interest in the submitted information. Consequently, you have asked the requestor to “clarify” his request by submitting additional search criteria. We believe that your request for additional information is an inappropriate use of the clarification process. Pursuant to section 552.222 of the Government Code, a governmental body may ask the requestor to clarify or narrow the scope of his request, if the governmental body determines in good faith that it cannot identify the requested information, or that the scope of information requested is unduly broad. Open Records Decision No. 663 (1999). However, in this instance, it is apparent from a plain reading of the request as well as, from your briefing, that the department was provided with sufficient information to identify the requested records. *See generally* Open Records Decision No. 497 (1988) (request is valid so long as it reasonably

¹You explain that one of the requestors is an attorney who represents the victim of the offense. The other requestor is a member of the general public.

can be identified as request for public records). Therefore, we do not believe that a request for clarification is appropriate in this instance.² See generally Open Records Decision No. 663 (1999) (stating, among other things, when governmental body may seek clarification or narrowing of request).

Furthermore, we believe that there is a difference between searching and identifying requested information, and whether it must then be released based on the request. A governmental body may not refuse to search for information because it believes that the responsive information may be excepted from disclosure. In response to a request, the governmental body must make a good-faith effort to relate the request to information in its possession. If the governmental body seeks to withhold any of the responsive information, the governmental body should, among other things, submit complete briefing stating why the claimed exceptions apply. See Gov't Code § 552.301 (providing procedures for requesting an open records decision). If the governmental body believes that the requestor's knowledge should have any bearing on this office's decision, the governmental body *should* include that information in its brief. However, the governmental body should not use the requestor's knowledge as a reason not to search for responsive information. Gov't Code §§ 552.222, .223

We will now address your claimed exceptions for the submitted information. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses common law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information is excepted from required public disclosure by a common law right of privacy if the information (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found.*, 540 S.W.2d 668.

In Open Records Decision No. 393 (1983), this office concluded that, generally, only that information which either identifies or tends to identify a victim of sexual assault or other sex-related offense may be withheld under common law privacy, because the identifying information was inextricably intertwined with other releasable information, the governmental body was required to withhold the entire report. Open Records Decision No. 393 (1983) at 2; see Open Records Decision No. 339 (1982); see also *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.--El Paso 1992, *writ denied*) (identity of witnesses to and victims of sexual harassment was highly intimate or embarrassing information and public did not have legitimate interest in such information); Open Records Decision No. 440 (1986) (detailed descriptions of serious sexual offenses must be withheld). It appears that both requestors in this case know the identity of the alleged victim. However, as previously noted, the first

²We note that a governmental body may seek additional information from a requestor if the governmental body believes that the requestor has a special right of access to the requested information. See Gov't Code § 552.023, .022(c).

requestor is the victim's representative and, therefore, has a special right of access to his client's private information. *See* Gov't Code § 552.023 (providing that person or person's authorized representative has special right of access, beyond the right of the general public, to information held by governmental body that relates to person and that is protected from disclosure by laws intended to protect that person's privacy interest). On the other hand, the second requestor is a member of the general public. We believe that withholding only identifying information from the second requestor would not preserve the victim's common law right to privacy. Therefore, the department must withhold from the second requestor the audio tape of the 911 call and the offense reports pursuant to section 552.101.

The department also seeks to withhold the audio tape of the 911 call under section 552.108(a)(1). Section 552.108 of the Government Code provides in relevant part as follows:

(a) [i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of 552.021 if: (1) release of the information would interfere with the detection, investigation or prosecution of crime; [or] (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Generally, a governmental body claiming an exception under section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(b)(1); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You explain that the audio tape of the 911 call relates to a pending criminal investigation. Based on your representations, we find that release of the audio tape to the victim's representative would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, pursuant to section 552.108, we conclude that the department may withhold the audio tape from the victim's representative as well.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

³The victim's representative did not request a copy of the offense report. Therefore, we need not address whether this individual has a special right of access to any of the information contained in that document.

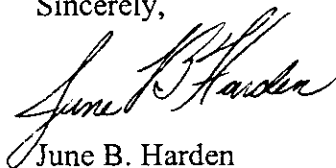
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "June B. Harden".

June B. Harden
Assistant Attorney General
Open Records Division

JBH/CHS/ch

Ref: ID# 133893

Encl. Submitted documents and audio tape

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